No. 94-1620, No. 94-1621

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

MONICA GREENE, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, THE COLLEGE BOARD, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, LAW SCHOOL ADMISSION COUNCIL, NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, *ET AL.*, IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The *amici* are national organizations that represent public and independent higher education institutions. They share a vital interest in legal standards applicable to race-conscious programs in higher education, as well as a strong commitment to increasing the participation of minority students in American colleges and universities, including

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[1] This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

where opportunities for such students historically have been limited. *Amici* also strongly favor greater minority student participation in higher education to secure the educational benefits of diversity.

Amicus American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education on a nationwide basis. Its members consist of approximately 1700 institutions, including a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of higher education, including the interests of component groups of the academic community: students, faculty, administration, and employees. Many of ACE's members either have or are considering minority-targeted financial aid programs, among other measures, to assure effective recruitment and retention of minority students. The other *amici* on this brief [2] collectively represent a very broad range of interests of the American higher education community.

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[2] In addition to ACE, *amici* are the American Association of State Colleges and Universities (represents more than 370 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands); American Association of Dental Schools (represents all United States dental schools, and affiliated institutions); Association of American Law Schools (legal education's principal representative to the federal government and to other national higher education organizations and learned societies); Association of American Medical Colleges (composed of 126 medical schools, 405 teaching hospitals, 92 academic societies, and related organizations); Association of American Universities (56 public and independent American, and two Canadian, universities with strong programs of graduate and professional education and research); Association of Community College Trustees (represents governing boards of the more than 1300 community colleges throughout the United States and Canada); Association of Governing Boards of Universities and Colleges (represents 30,000 member trustees, presidents, and chancellors who serve 1700 public and independent colleges and universities); The College Board (association of nearly 3000 education organizations that focuses on facilitating the transition of students from school to college); Council

Amicus ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, which was co-chaired by former Presidents Gerald Ford and Jimmy Carter, and which issued a report in May 1988 that outlined strategies for improving rates of minority matriculation, retention, and graduation. ACE and other *amici* also have gathered data for and submitted extensive comments to the U.S. Department of Education in connection with the Department's review of policies and practices concerning minority-targeted financial aid programs. ACE participated as an *amicus curiae* in both rounds of proceedings below.

The decision striking down the Benjamin Banneker Scholarship Program at the University of Maryland at College Park ("UMCP") is of great concern to *amici* because it is inconsistent with their policies and goals favoring increased participation of minority students in higher education. Moreover, the Court of Appeals decision conflicts with prior rulings of this Court and other federal authorities, and thus creates great uncertainty for *amici's*

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for Advancement and Support of Education (represents approximately 2900 colleges and universities); Law School Admission Council (organization of 193 law schools in the United States and Canada; primary service is the Law School Admission Test); National Association for Equal Opportunity in Higher Education (association of 117 historically and predominately Black colleges); National Association of College and University Business Officers (represents over 2100 colleges and universities; promotes the sound management and financial administration of higher education institutions); National Association of Independent Colleges and Universities (represents over 840 private colleges and universities on public policy issues before the legislative, executive, and regulatory branches of the federal government); National Association of State Universities and Land-Grant Colleges (works to support the contributions that state and land-grant universities make through teaching, research, and public service/extension); National Association of Student Financial Aid Administrators (composed of more than 3000 postsecondary institutions as well as individuals and organizations concerned with student financial aid); and the National Association of Student Personnel Administrators (serves 5000 chief student affairs officers of higher education institutions).

member institutions. Finally, *amici* are concerned that by entering judgment for respondent without addressing petitioners' claim that the Banneker program is justified as a measure to secure student diversity, the Court of Appeals failed to credit sound legal precedent and established educational practice. *Amici* believe that sensitivity to these considerations is imperative, for the promotion of student diversity is a principled and educationally necessary objective that underlies minority-targeted aid programs operated by colleges and universities throughout the United States.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance regarding the efforts of American colleges and universities to redress the nation's legacy of discrimination and unequal participation in higher education, on account of race. The Court of Appeals decision striking down the Banneker Scholarships is flawed because of its narrow and inaccurate view of such minority scholarship programs. That view is inconsistent with the record as well as the experience of American colleges and universities, decisions of this Court, and longstanding federal government policies. Moreover, the Court of Appeals erred by summarily precluding the University of Maryland from defending the Banneker Scholarships based on their contribution to student diversity, a principled and educationally necessary goal well founded in this Court's decisions. Accordingly, the Petitions of William E. Kirwan, *et al.*, and Monica Greene, *et al.*, should be granted and the Court of Appeals decision should be reversed. Alternatively, the Court should grant a writ of *certiorari* to vacate the Court of Appeals Order, with instructions to remand this case to the district court for consideration of the diversity issue.

In ruling that the Banneker Scholarhips cannot withstand strict scrutiny, the Court of Appeals failed to consider evidence that minority-targeted financial aid pro-

grams, including UMCP's plan, are narrowly tailored remedies for lingering vestiges of past institutional discrimination. Proof in the record, recent empirical studies, and the experience of *amici* demonstrate that such programs are effective and often essential to enable colleges and universities to attract and retain minority students; are limited in scope and diffused in their impact on non-minority students, and thus are minimally intrusive means to increase minority participation in higher education; and are tailored to specific institutional circumstances that impede attraction and retention of minority students. The Banneker program thus is consistent with the Court's announced principles governing voluntary race-conscious public actions.

The Court of Appeals further misapplied the strict scrutiny standard by establishing novel and onerous requirements for colleges and universities. Its ruling would handcuff higher education institutions in their thoughtful and measured pursuit of the legitimate purposes served by minority scholarships. If allowed to stand, the ruling may deter UMCP and other colleges and universities from worthy and essential efforts to remedy past discrimination.

The Court of Appeals violated established legal principles by entering final judgment for respondent without examining the educational benefits of student diversity as an alternative basis for the Banneker Scholarships. The Court of Appeals rendered such a summary judgment *sub silentio*, declining to address UMCP's reliance on diversity or the arguments of *amici* on the diversity issue. Thus, neither lower court has expressly ruled on that issue. This clear error is another reason that the Court should grant *certiorari* and reverse the Court of Appeals ruling striking down the Banneker Scholarships. Alternatively, and in the event the Court elects not to reexamine the express rulings of the Court of Appeals, *amici* respectfully urge the Court to grant the writ for the limited purpose

of vacating the Court of Appeals judgment, with instructions to remand for district court consideration of the diversity issue.

ARGUMENT

I. THE COURT OF APPEALS DISREGARDED AMPLE EVIDENCE THAT MINORITY-TARGETED FINANCIAL AID PROGRAMS LIKE THE BANNEKER SCHOLARSHIPS ARE SMALL, UNIQUELY EFFECTIVE, AND TAILORED TO THE EDUCATIONAL NEEDS OF COLLEGES AND UNIVERSITIES THAT SPONSOR THEM, AND THUS ARE A MINIMALLY INTRUSIVE, VOLUNTARY MEANS TO LAWFUL ENDS.

Based on nationwide data, their members' experience, and record evidence regarding the Banneker Scholarships, *amici* believe that key features of "minority-targeted" [3] financial aid programs were wholly disregarded by the Court of Appeals in this case. Its ruling is consequently flawed and should be reversed.

An overwhelming consensus exists in the higher education community that minority-targeted aid programs such as the program at issue are effective, minimally intrusive means to assist higher education institutions to eradicate lingering effects of past discrimination and secure the educational benefits of racial and ethnic diversity. Moreover, most colleges and universities that employ minority scholarships consider them an essential component of their efforts to increase minority student participation in higher education. *Amici* respectfully urge the Court to take into account this national and historical perspective in deciding whether to examine the Court of

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[3] *Amici* use the term "scholarship" herein as a synonym for "financial aid" and the term "minority-targeted" assistance to refer to financial aid for which membership in a particular historically underrepresented—*i.e.*, minority—group, or in one of several such groups, is a basis for eligibility.

Appeals' sweeping and in the view of *amici* misguided judgment that the Banneker Scholarships program is unlawful.

Recent empirical analyses of minority scholarship programs demonstrate clearly that such plans are widespread, effective, limited in size and scope, and highly varied in the criteria they apply and the specific goals they serve. Each of these factors weighs in favor of such programs, including the Banneker Scholarships, under applicable decisions of this Court.

The studies contain striking findings concerning the prevalence of minority-targeted financial aid programs. For instance, the United States Government Accounting Office found, based on a random-sample survey of 300 four-year undergraduate and graduate schools, that 64 percent of undergraduate schools and 72 percent of professional schools surveyed award at least some minority-targeted aid.[4] A report prepared by ACE in 1991 that summarized data from two other studies of minority-targeted aid programs related similar results: more than 80 percent of institutions surveyed (89 percent in one study, 83 percent in the other) have aid programs for which minority status was a criterion.[5]

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[4] Human Resources Division, U.S. Government Accounting Office, *Higher Education, Information on Minority-Targeted Scholarships* (1994) (GAO/HEHS-94-77) ("GAO Study"), at 57 (Table III.2); *see also* Brief of *Amicus Curiae* American Council on Education in Support of Appellees (4th Cir. 1994) (Nos. 93-2527, 93-2585) ("Podberesky II ACE Am. Cur. Br."), Addendum ("Add."), at 1. The comparable figure for graduate schools is 32 percent. *Id.*

[5] Letter from Robert H. Atwell, President, American Council on Education, to The Honorable Lamar Alexander, U.S. Secretary of Education (May 2, 1991) (transmitting report entitled *Minority-Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs*) (summarizing data collected by the National Institute of Independent Colleges and Universities and the American Association of State Colleges and Universities) ("ACE Compilation"), at 7 (Table 1).

Higher education institutions have embraced targeted aid to minority students "as an essential strategy" to remedy past discrimination and attain the educational benefits of student diversity.[6] Pursuit of these goals is considered fundamental to providing a first-class program of higher education.[7] Higher education leaders' commitment to these goals is matched by their testimony to the importance and effectiveness of minority scholarship programs in achieving these objectives. In 1991, ACE reported that 63 percent of college administrators surveyed agreed that minority-targeted financial aid programs were "very important to [their] ability to attract and retain minority students."[8]

By contrast, prominent American educators have spoken out regarding the relative ineffectiveness of race-neutral financial aid strategies for increasing participation of minority students. As the former President of Princeton University and the current President of Harvard University have written, "the targeting of financial aid [to minority students] has obvious advantages: [g]reater visibility and clarity are achieved, a stronger 'signal' [of welcome] is sent, and available funds can be invested with

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[6] *See Department of Education's Race-Specific Scholarship Policy: Hearings Before the Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives*, 102d Cong., 1st Sess. 61 (1991) ("Hearings") (statement of Donald M. Stewart, President, The College Board).

[7] *See, e.g.*, App. 213a-216a (UMCP April 26, 1993 Decision and Report, discussion of Danforth, Hackney, and Shalala affidavits).

[8] ACE Compilation 1. *See* Hearings 39 (Statement of Richard Rosser, Ph.D., President, National Association of Independent Colleges and Universities) ("We had to have minority scholarships to get students to DePauw University. This is true, I would guess, of the majority of our private colleges and universities—which historically, of course, were essentially white institutions. We had to reach out and indicate to minorities that they really were wanted").

maximum likelihood that they will achieve their true purpose." [9]

The record evidence is strong that the Banneker program is effective and that UMCP needs minority-targeted aid in order to attract and retain high-achieving minority students. (App. 194a-210a). Among the significant benefits of the program in the view of *amici* is its contribution to redressing racial stereotypes regarding minority student achievement. For instance, Banneker scholars "have a higher concentration in . . . science and technical majors . . . traditionally . . . less accessible to African Americans." (App. 196a.)

Although widespread, minority scholarship plans are limited in size. For example, the GAO reported that such programs account for only five percent of individual financial aid awards, and four percent of financial aid funds at the undergraduate level.[10] At the graduate level, such programs account for approximately three percent of individual aid awards, and five percent of total aid dollars.[11] The percentage of students in the surveyed institutions who receive minority-targeted aid is still smaller—no more than one percent at the undergraduate and graduate levels, and no more than four

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[9] Bowen, William G., and Rudenstine, Neil L., *Colleges Must Have the Flexibility to Designate Financial Aid for Members of Minority Groups*, The Chronicle of Higher Education, January 9, 1991, at B3.

[10] *See* GAO Study 58 (Table III.4); Podberesky II ACE Am. Cur. Br. Add. 2.

[11] *Id.* The proportion of minority-targeted aid is somewhat higher at professional (medical, law, and dental) schools surveyed by GAO (10 percent of all awards and 14 percent of all funds). *Id.* These results are consistent with the experience of such schools that it is extremely difficult to attract and retain minority students in significant numbers.

percent at the professional level.[12] Even the proportion of minority students receiving targeted aid is limited. Approximately seven percent of minority undergraduates, four percent of minority graduate students, and fifteen percent of minority students in professional school, receive such aid. *Id.*

The 1991 ACE study reached similar conclusions. Less than one percent of students in the surveyed institutions received minority-targeted aid. Between three and four percent of minority students received such aid. The programs represented no more than 2.5 percent of total aid funds at the institutions.[13]

It is thus clear that minority-targeted aid programs generally have no more than a *de minimus* impact on students otherwise qualified for financial aid who are ineligible for minority-targeted aid. These current practices of American colleges and universities pose no appreciable risk of harm to non-minority students' access to higher education.

The Banneker Scholarships, which account for only one percent of total available student aid at UMCP, are modest in scope and minimally intrusive. (App. 87a.)[14] Accordingly, *amici* agree with petitioners that respondent Podberesky failed to show that he suffered any significant injury as a result of the Banneker program.

A feature of minority-targeted aid programs is their great variety, based on distinctive institutional needs. Although most such programs are designed to reach students in racial or ethnic minority groups, the pre-

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[12] *Id.* at 66 (Table III.10); Podberesky II ACE Am. Cur. Br. Add. 3.

[13] ACE Compilation 7 (Table 1).

[14] *Compare Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (allocation of 60 percent of institutional aid for minority or disadvantaged students in first year class violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d).

cise features and criteria of the programs vary greatly. For instance, the GAO identified, in its sample of colleges and universities, aid programs targeted to religion-, gender-, age-, national origin- and disability-based minority groups.[15] The GAO also discovered, upon in-depth examination of six institutions that offer minority-targeted aid, that the programs differed substantially based on such factors as the extent of the university's reputation as an inhospitable place for minority students to obtain an education, the extent of the institution's past success in recruiting and retaining minority students, the incidence of minority faculty on campus, the extent of the minority population in the state or region in which the institution is located, and additional factors affecting the success of recruitment and retention strategies other than minority-targeted aid.[16]

The data and views summarized above support petitioners' contentions that the challenged program is lawful under the Court's decisions governing voluntary race-conscious actions, including *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), as well as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). That is, these facts strongly suggest that UMCP's program is not an arbitrary set-aside, that the Banneker Scholarships are minimally intrusive with respect to students ineligible for such aid, and that alternative programs are inadequate to attract and retain substantial numbers of high-achieving African-American students who will help UMCP to overcome its legacy of segregation.

The Court of Appeals evidently gave no meaningful consideration to these matters. This Court should grant

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[15] GAO Study 60 (Table III.6).

[16] *Id.*, Appendix IV ("Case Studies of the Use of Minority-Targeted Scholarships at Six Schools").

the writ to ensure that an issue of great national importance, and vital to colleges and universities throughout the country, is decided in light of the record and the experience of the higher education community.

II. THE LEGAL STANDARDS EMBRACED BY THE COURT OF APPEALS WOULD RENDER IMPRACTICAL MANY GOOD FAITH EFFORTS, SUCH AS THE BANNEKER SCHOLARSHIPS, TO REMEDY VOLUNTARILY PAST DISCRIMINATION IN HIGHER EDUCATION.

Amici respectfully urge the Court to review the Court of Appeals decision because of the uncertainty, alarm, and confusion it has sown among colleges and universities regarding the legality of minority scholarship programs. The Court of Appeals, by deviating from precedent and applying harsh new constraints to the autonomy of higher education institutions, generated deep concern and confusion among the membership of *amici*, including institutions that already have minority-targeted financial aid programs and others that contemplate establishment of such programs.

Among the concerns expressed by *amici's* member institutions regarding the legal standards embraced by the Court of Appeals are the following. First, many higher education institutions are distressed because, as petitioners have articulated in their papers, the Court of Appeals analysis of the present effects of past discrimination found by the district court appears to conflict with this Court's rulings. These include decisions regarding the legal standards applicable to voluntary race-conscious actions by public bodies, *see Croson, supra; Wygant, supra*, and the Court's decisions regarding the obligations of public schools to eliminate vestiges of past discrimination.[17] Second, many colleges and uni-

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[17] *See* Petition No. 94-1620, Section I; Petition No. 94-1621, Section I.

versities are confounded by the disparity between the Court of Appeals decision and the recent U.S. Department of Education Final Policy Guidance regarding minority-targeted financial aid programs, as well as the long-standing position of the federal government with respect to such programs. *See* Notice of Final Policy Guidance, 59 Fed. Reg. 8756 (February 23, 1994).[18]

The Court of Appeals decision establishes a test for "strict scrutiny" virtually impossible for many colleges and universities to satisfy. The Court of Appeals legal analysis would impose onerous and novel requirements on members of the *amici* that are committed to taking steps, within appropriate legal bounds, to increase minority students' participation in higher education. Thus, a consequence of allowing the Court of Appeals ruling to stand would be to discourage and in many respects to render infeasible good faith, voluntary steps by colleges and universities to remedy lingering effects of past discrimination on their campuses.[19]

The Court of Appeals failed to acknowledge UMCP's very extensive documentation and articulation of the dual

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[18] *See* Petition No. 94-1620, Section II. Another source of concern regarding the conflict between the Court of Appeals decision and the Final Policy Guidance derives from the twists and turns of the federal government in reviewing its long-standing policy on minority-targeted financial aid. After several years of uncertainty during which it appeared that the government might alter its approval of narrowly tailored minority-targeted aid programs, the Final Policy Guidance purported to resolve the uncertainty by ratifying and elaborating federal policy. *See* H.R. Rep. No. 102-411, 102d Cong., 1st Sess. 7-8 (1991) (noting rulings by federal officials in the early 1980s approving minority-targeted aid programs).

[19] That result is particularly unfortunate where, as here, the institution is part of a formerly dual system of public higher education, and thus has an affirmative duty to combat vestiges of segregation. *See* Petition No. 94-1621, at 18-21; Petition No. 94-1620, at 15, 25-26.

rationale underlying the Banneker Scholarships. UMCP commissioned expert studies, obtained sworn testimony, and issued a 61-page Decision and Report concerning the questions the Court of Appeals posed in its January 1992 remand order: Do present effects of past segregation exist at UMCP justifying the Banneker program, and if so, what are those effects? The Court of Appeals decision conveys a skewed impression of the record in this respect. Rather than relate the facts concerning UMCP's Decision and Report that the district court addressed, the Court of Appeals merely noted that "[t]he district court allowed additional discovery to take place, after which cross-motions for summary judgment were filed." (App. 5a.) The implication, that UMCP's effort amounted to no more than routine discovery, fails to depict what happened. The district court more accurately described the record, noting the "strong" evidence produced by UMCP of present effects of past discrimination (App. 51a), as well as UMCP officials' "moral courage" in "engag[ing] in extended self-criticism." [20] *Amici* are concerned that if the University's very extensive evidence is adjudged so lacking in value, the law will be thought to impose an insuperable burden of proof. As a result, the law will give little incentive for other institutions—even those with pronounced lingering effects of past discrimination and small minority student populations—to acknowledge a need for narrowly tailored race-conscious remedial measures.

The Court of Appeals required UMCP to satisfy numerous other specific requirements supposedly linked to a fair inquiry into whether the Banneker program is nar-

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[20] App. 51a n.47: "It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor."

rowly tailored. A few of these will demonstrate the onerous and novel quality of the Court's interpretation of the "strict scrutiny" test.

In treating the important topic of race-neutral alternatives, the Court of Appeals nowhere addressed one of petitioners' key claims in support of the Banneker program, that aid programs in which race is considered as one of many factors (or not at all), rather than as an eligibility criterion, are ineffective to increase minority recruitment and retention. (App. 26a-28a, 82a-84a.) The Court of Appeals merely stated, erroneously, that "the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem." (App. 27a.) The Court of Appeals also criticized UMCP for failing to try several supposed alternatives to financial aid, without identifying any record evidence that such measures are feasible or even race-neutral.[21] The approach of the Court of Appeals, to bypass extensive record evidence and propose alternative remedies that have no basis in evidence, was inconsistent with this Court's holding in *United States v. Paradise*, 480 U.S. 149, 171 (1987), that it is insufficient to posit race-neutral alternatives without establishing their efficacy relative to a challenged race-conscious program.

Petitioners identify other unwarranted aspects of the Court of Appeals decision. For example, petitioners note that the Court of Appeals erred in demanding that, to justify goals for ameliorating underrepresentation of minority students, UMCP would be required to "factor out . . . all nontrivial, non-race-based" explanations for dis-

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[21] App. 26a (referring to additional "campus job opportunities" and "convenient, attractive, economically reasonable campus housing" for minority students). The exact nature of these supposed alternatives is quite vague. However, it appears, inexplicably, that the Court of Appeals faulted UMCP for not considering setting aside campus jobs or housing for minority students, while holding that UMCP may not allocate financial aid on that basis.

parities in minority and non-minority representation in the student body.[22] *Amici* agree with petitioners' analysis. Enforcement of such a requirement would tend to render minority scholarship programs impracticable. Most colleges and universities lack resources to conduct such elaborate analyses on a regular basis.[23]

The rigid approach the Court of Appeals employed in applying this Court's strict scrutiny requirement is inconsistent with the Court's admonition in *Bakke* that the Fourteenth Amendment must be enforced with due regard for "[t]he freedom of a university to make its own judgments as to education." 438 U.S. at 312. Unless the Court grants *certiorari* to correct this error, colleges and universities will be unsure whether they will next be subjected to similarly onerous requirements as a price for making modest and voluntary efforts to encourage minority presence on campus.

III. THE COURT OF APPEALS' IMPLICIT REJECTION OF DIVERSITY AS A LAWFUL RATIONALE FOR MINORITY-TARGETED FINANCIAL AID PROGRAMS WAS UNFOUNDED IN LAW OR FACT AND SHOULD BE VACATED.

ACE joined UMCP below in asserting that the Banneker Scholarships are justified as a narrowly tailored means to serve the lawful purpose of securing and main-

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[22] *See* Petition No. 94-1620, at 21-23; Petition No. 94-1621, Section II.

[23] For related reasons having to do with the strongly-held view of colleges and universities that they should be entitled to conduct their own admissions processes—within appropriate legal limits, of course—*amici* also consider onerous the Court of Appeals' suggestion that the judiciary may hold the institutions to a formulaic determination of what their "effective minimum criteria" for admission are, notwithstanding the fact that institutional policy may establish a more flexible approach to admissions that will produce varied results from year to year. (App. 16a-18a.)

taining racial diversity within UMCP's student population. However, neither court in this case has to date squarely addressed the diversity issue. Notwithstanding that, and without explanation, the Court of Appeals implicitly rejected the diversity rationale in entering final judgment for respondent. The Court should grant *certiorari* to vacate that unfounded ruling, which concerns an issue of grave importance to many colleges and universities, including UMCP. If the Court sustains the ruling below that there are no lingering vestiges of past discrimination justifying the Banneker Scholarships, the Court should direct a remand to the district court for further proceedings on the diversity issue.

UMCP directly addressed the diversity issue on remand in the district court when UMCP relied on achieving student diversity as one of two grounds supporting its motion for summary judgment. (App. 157a, 213a-218a.) In its Decision and Report assessing whether there was a continuing basis for such a race-exclusive program, UMCP explained that its commitment to ethnic diversity is "integral" to its commitment to educational excellence. (App. 214a, 217a.) UMCP reasoned as the Court did in *Bakke* that "quality education takes place through wide exposure to the robust exchange of ideas," and that such interchange "is facilitated and enhanced when . . . students are brought together from various backgrounds and ethnic groups." (App. 214a-215a.)[24] The Banneker Program, UMCP concluded, was intended to address the "single greatest recruitment challenge" impeding attainment of student diversity. (App. 217a-218a.) Notwithstanding UMCP's articulation of its diversity rationale, the district court declined to address it.

As an *amicus curiae* opposing respondent's appeal of the 1993 district court ruling, ACE asked the Court of Appeals "to take into account the possibility that its analy-

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[24] *See* 438 U.S. at 312-13.

sis of the Banneker Program" as a measure to remedy the present effects of past discrimination "may affect similar programs adopted to achieve campus diversity."[25] Like UMCP,[26] ACE sought to preserve the possibility of district court review of the diversity issue.[27] However, the Court of Appeals did not mention the diversity issue in entering judgment for respondent. (App. 30a.)

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[25] Brief of *Amicus Curiae* American Council on Education in Support of Appellees (4th Cir. 1994) (Nos. 93-2527, 93-2585) ("Podberesky II ACE Am. Cur. Br.") 2 n.2.

[26] *See* Petition No. 94-1620, at 29 (noting UMCP's specific request that the Court of Appeals remand for consideration of diversity if it reversed the district court ruling).

[27] To that end, ACE presented to the Court of Appeals three major arguments in favor of the Banneker Program, under the diversity rationale, that ACE also had made as an *amicus curiae* in earlier proceedings in this case. *See, e.g.*, Brief of *Amicus Curiae* American Council on Education in Support of Appellees' Petition for Rehearing and Suggestion for Rehearing In Banc (4th Cir. 1992) (No. 91-2577). First, ACE argued that the record demonstrated that the Banneker Scholarships are operated in a manner consistent with the Court's rulings in *Bakke, Croson, Wygant,* and *Paradise, supra,* because they are narrowly tailored to serve the institution's interest in student diversity. In particular, ACE argued that the Banneker Scholarships are far more effective than programs that are race-neutral or that consider race or ethnicity as only one of many factors, and are distinctly different from the "set-aside" or race-based layoff plans condemned in *Croson, Wygant and Bakke,* because the Banneker Scholarships impose at most "relatively light" and broadly "diffused" adverse effects on ineligible non-minority students. *See* Podberesky II ACE Am. Cur. Br. 3-8; *Wygant*, 476 U.S. at 282. Second, ACE asserted that an evaluation of the Banneker program under the strict scrutiny standard should give due regard to the important First Amendment academic freedom considerations summarized by Justice Powell in *Bakke, see* 438 U.S. at 311-14; *see also Sweezy v. New Hampshire,* 354 U.S. 234 (1957); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), which are implicated by university policies related to promotion of student body diversity. *See* Podberesky II ACE Am. Cur. Br. 9-11. Third, ACE argued that a thorough strict scrutiny analysis of the Banneker Program could not ignore the recent regulatory

Amici concur with petitioners that the Court of Appeals' entry of a final judgment in favor of respondent implicitly rejected contentions that the Banneker Scholarships are constitutionally justified as a means to achieve the educational benefits of diversity.[28] *Amici* are concerned that this action may be improperly interpreted to condemn diversity as the basis for a minority-targeted scholarship plan. Accordingly, *amici* join the petitioners in urging the Court to grant *certiorari* to rectify this error.

Substantial harm would result to petitioners, *amici*, their members, and others if the Court of Appeals' implicit rejection of the diversity rationale is allowed to stand. Petitioners will have been denied a fair opportunity to have their diversity claim considered. Petitioners and all future students and other present and future members of the UMCP community will be denied the educational benefits of diversity that might have been nurtured by the Banneker Scholarships. Colleges and universities throughout the nation, and especially those in the Fourth Circuit, will be chilled in their good faith efforts to achieve student diversity through minority scholarships. These consequences would be particularly adverse in light of recent data that show limited progress, and in some respects declines, in minority participation in higher education.[29]

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pronouncement on the subject by the U.S. Department of Education. *Id.* at 11-12 (discussing Final Policy Guidance).

[28] *See* Petition of William E. Kirwan, *et al.*, No. 94-1620, at 29; Petition of Monica Greene, *et al.*, No. 94-1621, at 30 n.29.

[29] *See, e.g.*, Carter, Deborah J., and Wilson, Reginald, *Minorities in Higher Education, 1994 Thirteenth Annual Status Report* 2 (American Council on Education 1995) ("African American high school graduates have experienced little improvement in college participation since 1990"); *id.* at 3, 10-12 (noting increase, from 1990 to 1993, in gap between college participation by African American and white high school graduates).

Amici urge the Court to grant the writ to preserve UMCP's right to establish that its reliance on the diversity rationale is valid. Reversal of the Court of Appeals decision would accomplish that result. Alternatively, the Court should vacate the Court of Appeals judgment at least to the extent that the judgment implicitly resolves the diversity issue. Further, the Court should direct the Court of Appeals to remand this matter to the district court for adjudication of the merits of the diversity rationale.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and either reverse the decision below, or vacate the decision below and remand for further proceedings that entail consideration of promoting student diversity as a basis for the minority-targeted financial aid program at issue.

Respectfully submitted,

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